IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

MICHELE MARCHESE,

Petitioner,

vs.

UNITED STATES OF AMERICA AND PRESTON SMITH, WARDEN OF THE UNITED STATES CORRECTIONAL INSTITUTION AT TERMINAL ISLAND, CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Judgment Dismissing Petition for Writ of Habeas Corpus Sought to Be Reviewed.

RUSSELL E. PARSONS,
300 West Third Street,
Los Angeles 13, California,
Attorney for Petitioner Michele Marchese.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Judgment Dismissing Petition for Writ of Habeas Corpus Sought to Be Reviewed.

Petitioner Michele Marchese respectfully petitions for a writ of Certiorari to review the judgment or order made by the United States District Court, Southern District of California, Central Division and the judgnent of affirmation in Ninth Circuit Court of Appeals. A copy of the Return to the Petition for a Writ of Habeas Corpus and a copy of the order to the United States District Court are attached hereto in the appendix as "A" and "B". The opinion of the Ninth Circuit is as yet unreported, but a copy is attached hereto in the appendix marked "C" and is hereby referred to.

The petitioner was convicted of ten counts of the Indictment charging conspiracy and violation of the narcotics laws of the United States involving three sales and his co-defendant Jesse Del Bono was convicted of four counts in the said United States District Court, Southern District of California, Central Division on June 16, 1958.

On April 15, 1958 the Ninth Circuit Court of Appeals affirmed the judgment of conviction without opinion or decision on appeal and on June 29, 1959 the petition for certiorari was denied by the United States Supreme Court also without opinion.

A motion was made under Section 2255 of Title 28 U. S. C. in said District Court to annul vacate and set aside the judgment of conviction in case of *Marchese v. United States of America,* No. 1300-60-T.C., and the same was denied on December 22, 1960 and a petition for rehearing and reconsideration of an amended and renewal motion was made and denied by said Court of March 15, 1960. The time for appeal was permitted to lapse.

A petition for a writ of habeas corpus was filed by petitioner in said District Court on June 20, 1961 in this case and on the 29th day of June 1961, the said petition was dismissed *ex parte* without a hearing and the judgment or order of dismissal was affirmed by the Ninth Circuit Court of Appeals on May 31, 1962 and a petition for rehearing was denied on July 12, 1962.

At no stage of the proceedings in this case or in the case in which petitioner was convicted has there ever been a decision or opinion on the merits on any of the grounds urged. In this case the opinion of the Circuit Court only covered the question as to the jurisdiction of the District Court and did not pass upon the questions involved as to the violation of petitioner's constitutional rights.

Jurisdiction is conferred by Title 28, Section 1254(1) U. S. Code to review the judgment in question.

Statutes Involved.

Title 28, Sec. 2255 U. S. C. provides in part as follows:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the Court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial of infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

United States Constitution, Part I, Section 9, Clause 2 which provides:

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Fourth Amendment to U. S. Constitution;

Fifth Amendement to U. S. Constitution;

Fourteenth Amendment to U. S. Constitution;

Title 28, U. S. C. Sec. 2241(a);

Title 28, U. S. C., Sec. 2243;

Title 47, U. S. C. Sec. 605.

QUESTIONS PRESENTED.

I.

Questions Presented in Petition for Writ of Habeas Corpus Not Passed Upon by United States District Court or United States Circuit Court.

(a) The judgment of conviction by the use of "silver platter" evidence is in violation of the Due Process of Law clause of the Constitution of the United States;

(b) Sussman's entire course of behavior from January 29, to March 23, is susceptible of only one reasonable interpretation and that was that there was between himself and Federal and State authorities an agreement to entrap the petitioner, in exchange for money, narcotics, favoritism and leniency for himself. Such course of conduct and subsequent testimony, over objections, denied the petitioner a fair and impartial trial, guaranteed him under the Fifth Amendment of the United States Constitution;

(c) During the petitioner's trial, the United States Attorney abused the privileges of his office by knowingly participating in the suppression of the truth and failing to disclose the truth concerning the obvious agreement or understanding between Donald Sussman and the Federal and State authorities, in disregard of the petitioner's constitutional rights under the Fifth Amendment, to the end he was denied a fair trial.

(d) The use of evidence obtained by the electronic recording device, known as the Schmidt Transmitter, was unlawful and violative of the Fourth Amendment of the Constitution, and hence cannot support the judgment of conviction;

(e) The arrest of the petitioner without a warrant of arrest, the search of his person and of his apartment or residence, the search of the automobile driven by the defendant Del Bono, as well as the searches made at other places without a search warrant, were all in violation of the Fourth Amendment;

(f) The evidence obtained by an unauthorized interception of a telephone conversation is in violation of Title 47, U. S. C. A., Section 605, as well as in violation of the Fifth Amendment to the Constitution.

II.

Questions Presented Other Than Those Involved in the Merits of the Petition for Writ of Habeas Corpus.

(a) That portion of Section 2255 of Title 28 U. S. C. wherein the right to petition for a writ of habeas corpus is prohibited or restricted is unconstitutional and in violation of Section 9, Clause 2 of the U. S. Constitution.

(b) The Court erred in the denial and dismissal of the petition for lack of jurisdiction without a hearing on the merits, and this denied petitioner due process of law in violation of the Fourteenth Amendment of the Constitution.

(c) If the petition be considered as a motion under Title 28, Section 225 U. S. C., the Circuit Court erred in holding that the petition was defective in that petitioner did not allege why he was unable or failed previously to assert new grounds raised in the petition or why he had previously been unaware of the significance of relevant facts.

(d). The Circuit Court erred in holding that decisions of the Supreme Court subsequent to the original motion under Title 28, Section 225 cannot be considered under a writ of habeas corpus even though constitutional rights of petitioner are involved.

Brief Statement of Facts.

We shall only briefly summarize the facts as they are set forth in detail in the petition for the writ of habeas corpus the record of which the Court will have. [See C. T. 5-11 incl.]* Since the Government in its return to the writ did not deny the statement of facts set forth in the petition, such facts must be assumed to be true.

White v. Regan, 324 U. S. 760.

Sussman, a dope peddler and addict convicted under the laws of California and on probation was indicted and arrested for violation of the narcotics laws of the United States. [C. T. 5, 6.] He was induced by the Federal and State narcotics agents to trap and secure the conviction of petitioner. During the six weeks of investigation prior to petitioner's arrest, Sussman was employed by the Federal Narcotics Bureau as a "special employee" and paid $600.00 [C. T. 6] with the knowledge and acquiescence of the agents during the investigation he was obtaining and using heroin "off the top" to satisfy his habit which was costing about $75.00 a day. [C. T. 6, 9.] While he was working with the agents he was taking shots every four or five hours and was continuously under the influence of narcotics and this was known to the agents. [C. T. 6, 9.]

*References to C. T. mean Clerk's Transcript in which is set forth the Petition for Writ of Habeas Corpus.

Sussman had been befriended by petitioner and had been a visitor in the latter's residence for several years. Petitioner had assisted Sussman financially and had tried to have him cured of his addiction [C. T. 6], using friendship as a means of entry, Sussman on three occasions entered Marchese's apartment with an electronic transmitting device known as a Schmidt transmitter, concealed on his person unknown to Marchese. [C. T. 7, 9.] The agents purportedly listened in on these conversations while stationed a block or two away. There was a conflict as to whether the conversations were recorded but at the trial the agent and Los Angeles Deputy Sheriff were permitted to testify as to the conversations overheard despite objections on the part of petitioner. [C. T. 8, 9.] No recordings were produced and although Sussman testified he approved the recording, the agents denied that recordings were made. [C. T. 7-10 incl.]

Although Sussman was given $1000.00 in marked money to purchase narcotics, no marked money was ever found in Marchese's possession, nor was any narcotic ever found in his possession. [C. T. 7-8.]

On the day of the arrest on March 13, 1958, even though Marchese and his co-defendant Del Bono had been under close surveillance by agents for six weeks, the agents entered Marchese's apartment with guns, arresting him and making a thorough search of the apartment without a search warrant but found no narcotics. [C. T. 8-9.] They, also about an hour prior to the ar-

rest, caused an auto driven by Del Bono to be searched without a search warrant and found a quantity of heroin. [C. T. 8.] This car was parked at the Charles Restaurant over a mile distant from Marchese's apartment. Objection was made by Marchese to the introduction of such evidence against him. [C. T. 10.]

During the investigation Agent Richards caused Sussman to call Marchese on the telephone and purportedly listened to the conversation with his ear close to the receiver. [C. T. 7-10.] Although he never heard Marchese speak in person until the day of the arrest, he incredibly testified he recognized Marchese's voice even though distorted by the Schmidt transmitter and even though he did not have the telephone receiver at his ear but only close to it while Sussman was holding it to his own ear. [C. T. 10, 11.]

At the trial, Sussman testified that no agreement or promise of leniency was given to him for cooperating with the agents. Federal Agent Richards, who was in charge of the investigation, testified he never heard of any promise of a lighter sentence made to Sussman if he would cooperate with the agents. [C. T. 21-22.] At that very time Sussman had already received the benefit of his cooperation, the full extent of which was not then known to Marchese or his attorneys. His indictment under Section 174 of Title 21 U. S. C. had been dismissed and he was charged under a different section and given a sentence of only two years *instead of a sentence of twenty years.* His violation of proba-

tion for a previous narcotics conviction under the California law was also terminated and he was given a sentence of one year to run concurrently with the Federal two year sentence. [C. T. 9, 10, 20, 21.]

The Deputy U. S. Attorney not only stood by while false testimony was knowingly given, by Sussman and Richards, but by objection suppressed any evidence relating to promises or agreements of leniency for Sussman. [C. T. 10, 11, 21, 22, 24.]

The facts set forth in the petition for the Writ of Habeas Corpus and referred to above show that the Federal agents conspired with Sussman to violate the law and acquiesced in his violation of the narcotics laws in order to obtain his cooperation and undoubtedly colored and perjured testimony in what we have referred to the petition as a "devil's bargain" between them. Reference is made to the petition for a more detailed statement of facts which were not denied by the respondent United States. [C. T. 5-11 incl., 20-22.]

ARGUMENT.

The six questions involved in the Petition for the Writ of Habeas Corpus were exhaustively discussed in the Petition and so we refer to the same as set forth on pages 13 to 42 inclusive of the Clerk's Transcript below, transmitted to this Court. We shall therefore, very briefly refer to such questions or points herein.

POINT I(a).

The Judgment of Conviction by the Use of "Silver Platter" Evidence Is in Violation of the Due Process of Law Clause of the Constitution of the United States [Discussion C. T. 13-15.]

The Federal agents conspired unlawfully with the state officer to obtain evidence they were unable to obtain lawfully and they are prohibited from using such evidence.

Rea v. U. S., 350 U. S. 214;
Elkins v. U. S., 364 U. S. 206.

A Federal agent (regular or special or informer) when obtaining evidence for a Federal prosecution must obey Federal rules of criminal procedure relating to search and seizure.

Rea v. U. S., 350 U. S. 214.

POINT I(b).

Sussman's Entire Course of Behavior From January 29, to March 23, 1958, Is Susceptible of Only One Reasonable Interpretation, and That Was That There Was an Agreement Between Himself and Federal and State Authorities to Entrap the Petitioner, in Exchange for Money, Narcotics, Favoritism and Leniency for Himself. Such Course of Conduct and Subsequent Testimony, Over Objections, Denied the Petitioner a Fair and Impartial Trial Guaranteed to Him Under the Fifth Amendment of the United States Constitution [Discussion C. T. 16-19].

The Federal agents used a convicted dope peddler, a narcotics addict, a probation violator, under Federal indictment for sale of narcotics to secure the arrest and conviction of petitioner, supplied him with money, freedom for a while and leniency of sentence and condoned his use of narcotics in violation of State and Federal Narcotics laws and other laws.

This type of law enforcement is violative of public policy of the United States.

In *Sherman v. U. S.*, 356 U. S. 369 at page 380, Mr. Justice Douglas quotes from the dissenting opinion of Mr. Justice Holmes in *Olmstead v. United States*, 277 U. S. 438, as follows:

> "It is also desirable that the Government should not itself foster and pay for other crimes when they are the means by which evidence is to be obtained."

POINT I(c).

During the Petitioner's Trial, the United States Attorney Abused the Privileges of His Office by Knowingly Participating in the Suppression of the Truth and Failing to Disclose the Truth Concerning the Obvious Agreement or Understanding Between Donald Sussman and the Federal and State Authorities, in Disregard of the Petitioner's Constitutional Rights Under the Fifth Amendment; to the End He Was Denied a Fair Trial [Discussion C. T. 20-24].

As pointed out in the summary of facts, there was evidence in the original record tending to show that an agreement or arrangement was made with Sussman, for his cooperation to give him leniency in the Federal prosecution as well as to relieve him of the serious consequence of his violation of probation under a state sentence. Yet the U. S. Attorney stood idly by while Sussman and Federal Agent Richards in charge of the investigation denied any arrangement, and made no objection to such obviously false testimony. In fact, by objection, to questions asked by defense counsel, the U. S. Attorney even suppressed evidence of any such arrangements.

In the case of *Napue v. Illinois*, 360 U. S. 264, the Supreme Court vigorously condemned such conduct on the part of the prosecutor and reversed the conviction of the prisoner therefor, holding that he did not have a fair trial.

POINT I(d).

The Use of Evidence Obtained by the Electronic Recording Device Known as the Schmidt Transmitter Was Unlawful and Violative of the Fourth Amendment of the Constitution, and Hence Cannot Support the Judgment of Conviction [Discussion C. T. 24-35].

In this case evidence was introduced over objection of the defendant Marchese of conversations purportedly taking place in Marchese's apartment between him and Sussman, obtained by the use of the electronic device known as the Schmidt Transmitter, concealed on the person of Sussman, unknown by Marchese.

We are not unmindful of the decision of this Court in the case of *On Lee v. U. S.*, 343 U. S. 747. A distinction should be drawn between that case and the case at bar. In the *On Lee* case the agent with the concealed device entered On Lee's laundry shop where the public was invited. Also part of the conversation obtained through the device took place on the sidewalks of New York. Both places were, therefore, public places. Even the solicitor general in his brief page 29 commenting on the dissenting opinion of Judge Frank in the U. S. Circuit Court, stated:

> "The various situations envisaged in the dissenting opinion where mechanical contrivances are used to publish conversations within a private home are unrelated to the present case. As has been observed above a private home is not involved; the conversation transpired is a place to which the public was invited."

In the present case, the purported conversation took place in Marchese's private apartment or residence, to which Sussman gained access by reason of his friendship and acquaintance with Marchese.

A like distinction was made in the case of *Order of Fraternal Eagles v. U. S.*, 57 F. 2d 93, between private homes and public places.

Doubt has been thrown on the holding of the majority in the *On Lee* (5 to 4) by the decision in the case of *Silverman v. United States*, 365 U. S. 505, where the introduction of a spike attached to a microphone, which penetrated only inches into the walls of the apartment of the defenant, was held violative of the prisoner's constitutional rights of freedom from illegal searches and seizures. The footnote No. 4 quoted with approval from the dissenting opinion of Judge Frank in the *On Lee* case.

Moreover, although the Supreme Court in the *Silverman* case stated that it declined to go beyond the case of *Goldman v. U. S.*, 316 U. S. 129, it did not make such a statement with reference to the *On Lee* case, and such omission and the concurring opinions of other justices raise an implication that the Court might re-examine its decision in the *On Lee* case and hold that the use of a electronics device introduced into private premises by concealment on the person of a visitor or invitee would violate constitutional rights.

POINT I(e).

The Arrest of the Petitioner Without a Warrant of Arrest, the Search of His Person and of His Apartment or Residence, the Search of the Automobile Driven by the Defendant Del Bono, as Well as the Searches Made at Other Places Without a Search Warrant, Were All in Violation of the Fourth Amendment [Discussion C. T. 36-39].

Petitioner was under constant surveillance for several weeks before his arrest, and the officers had ample time to secure a search warrant, but failed to do so. The invasion of his apartment and search thereof although nothing illegal was found, violated his constitutional rights. Likewise, the opening of the trunk of Del Bono's car and the use of the evidence found therein, without a search warrant; was also in violation of Marchese's constitutional rights. Even though Marchese was not at any time in the possession or control of the car and even though he denied any connection with or ownership or control over the narcotics found therein, he still had the right to object to such evidence seized by the "special agent Sussman."

Jones v. U. S., 362 U. S. 257.

Where officers have ample time to obtain search warrants, their failure to do so will preclude use of such evidence seized without a search warrant.

Chapman v. U. S., 5 L. Ed. 2d 828;

Taylor v. U. S., 286 U. S. 1;

Johnson v. U. S., 333 U. S. 10.

POINT I(f).

The Evidence Obtained by an Unauthorized Interception of a Telephone Conversation Is in Violation of Title 47, U. S. C. A., Section 605, as Well as in Violation of the Fifth Amendment to the Constitution [Discussion C. T. 39-42].

Sussman purportedly called Marchese at his home or apartment several times and Agent Richards listened in, holding his ear close to the receiver. We submit that this was violative of Title 47, Sec. 605 U. S. C. as to the use of communications.

The Supreme Court in the case of *Rathbun v. U. S.*, 355 U. S. 107, held that when petitioner, who had threatened one Sparks, called the latter and officers listened in on the extension, such was not a violation of the section. However, Justices Douglas and Frankfurter dissenting basing their opinions on *Nardone v. U. S.*, 302 U. S. 385.

A distinction exists between the *Rathbun* case and the one at bar. In the *Rathbun* case, the defendant initiated the call, whereas in the case at bar, the calls were made by Sussman and not by the petitioner.

POINT II(a).

That Portion of Section 2255 of Title 28 U. S. C. Wherein the Right to Petition for a Writ of Habeas Corpus Is Prohibited or Restricted Is Unconstitutional and in Violation of Section 9, Clause 2 of United States Constitution, Which Provides:

> "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

The last paragraph of Section 2255 of Title 28 U. S. C. provides as follows:

> "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

We submit that this is unconstitutional for it denies to a prisoner the right of habeas corpus arbitrarily if a previous motion was made under said section and denied. The Supreme Court has never passed upon this restrictive provision and it is of the utmost importance to lower courts to have such provision passed on.

In the outstanding case of *United States v. Hayman*, 342 U. S. 205, this Court held that said Section 2255 was not intended to impinge upon the prisoners rights of collateral attack but to minimize the difficulties encountered in applying for a Writ of Habeas Corpus.

This rule was also stated in *Hill v. U. S.*, 368 U. S. 424, where the Court also stated that the section was intended "simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined."

The lower Federal courts have many times held that the trial court does not have to entertain a second motion under Section 2255 and that a Writ of Habeas Corpus under the section is prohibited. This holding clearly impinges on the prisoners' constitutional rights and hence the restrictive provision is unconstitutional under the clause of the Constitution above quoted.

In neither the *Hayman* nor the *Hill* case did the Supreme Court have presented to it, nor did it pass upon the restrictive provision.

In the case of *Price v. Johnson*, 334 U. S. 266, the Court granted the fourth petition for Writ of Habeas Corpus because it contained a new ground. The Court also held that denial of previous petitions was not *res adjudicata.*

In the case of *Heflin v. U. S.*, 358 U. S. 415, the Court held with respect to Section 2255 as follows:

> "'The statute further provided: 'A motion for such relief may be made at any time.' This provision simply means that, as in habeas corpus, there is no statute of limitations, no res adjudicata and that the doctrine of laches is inapplicable."
>
> *Salinger v. Loisel*, 265 U. S. 224;
>
> *Waley v. Johnson*, 316 U. S. 101.

In view of the foregoing, the last paragraph of Section 2255 restricting prisoners' rights to habeas corpus is unconstitutional.

POINT II(b)

The Court Erred in the Denial and Dismissal of the Petition for Lack of Jurisdiction Without a Hearing on the Merits and This Denied Petitioner Due Process of Law in Violation of the Fourteenth Amendment to the Constitution.

The District Court upon the filing of the Return to the Petition for Writ of Habeas Corpus on June 29, 1961, made its order forthwith dismissing the petition without notice to the petitioner and without an opportunity to be heard. The dismissal was solely on the ground of lack of jurisdiction under Section 2255 and hence there was no decision on the merits. This was a denial of due process in violation of the Fourteenth Amendment to the Constitution.

It also violates Section 2255 itself which requires, unless the files and records of the case conclusively show that the prisoner is entitled to no relief, a hearing to determine the issues; and the making findings of facts and conclusions of law. The District Court even in the previous motion under Section 2255 did not have a hearing on the issues or make findings or fact or conclusions of law. Clearly the actions of the District Court were completely lacking in due process.

POINT II(c).

If the Petition Be Considered as a Motion Under Title 28, Section 2255 U. S. C., the Circuit Court Erred in Holding That the Petition Was Defective in That Petitioner Did Not Allege Why He Was Unable or Failed Previously to Assert New Grounds Raised in the Petition or Why He Has Previously Been Unaware of the Significance of Relevant Facts.

The decision of the Circuit Court was directly contrary to the decision of the U. S. Supreme Court in the case of *Price v. Johnson, supra,* which held that it was not necessary; or required of a petitioner set forth affirmatively that he had acquired new information or that he had adequate reasons for not previously alleging new grounds; and that if the Government chooses not to deny the allegation or question its sufficiency, it rests with the Government to show abuse of the process. Even if petitioner had prior knowledge of the facts he would be entitled to amend and the petition should not be dismissed without an opportunity to amend and to make a proper showing at a hearing.

The decision of the Circuit Court was in error in placing the burden on the petitioner to allege in his petition why he failed to assert new grounds previously, in holding his petition defective and refusing to pass on the merits or to permit an amendment and a hearing on such facts.

POINT II(d).

The Circuit Court Erred in Holding That Decisions of the Supreme Court Subsequent to the Original Motion Under Title 28, Section 2255, Cannot Be Considered Under a Writ of Habeas Corpus Even Though Constitutional Rights of Petitioner Are Involved.

Petitioner alleged certain new grounds not covered by his previous motion under Section 2255. These new grounds involved his constitutional rights and were raised partly because later decisions of the U. S. Supreme Court made such grounds valid and substantial, where as before they were overlooked or were considered of no value because of the then status of the law as established by earlier decisions.

The Circuit Court erroneously held that the impact of later decisions of the Supreme Court could not be used as a basis for the new grounds and it cited the case of *Sunal v. Large*, 332 U. S. 174 in holding that new decisions could not be used as a basis of habeas corpus on grounds not urged on appeal. However, the Circuit Court clearly overlooked the exceptions stated in the *Sunal* case namely "where the error does not trench on any constitutional rights of defendants." The Court in the *Sunal* case also stated that there are exceptions to the rule where there are exceptional circumstances.

In this case the constitutional rights of Marchese are involved. There are also exceptional circumstances,

notably that at no time at any stage of any of the proceedings, original, appellate or by collateral attack has there ever been an decision or opinion on the merits. Consequently it can't be determined if any particular ground urged at any time was considered as valid and substantial. Certainly petitioner is entitled to an opinion on the merits of his petition, especially since any order or decision, at least so far as one on a motion under Section 2255 or on petition for writ of habeas corpus is concerned, since the doctrine of *res adjudicata* does not apply to such proceedings.

Conclusion.

In conclusion we respectfully submit that the constitutional rights of the petitioner, especially in connection with the use of the concealed electronic device, were violated. The question of the right to use such devices is being constantly raised in trial courts and should be determined by the Court. Furthermore, the unconstitutionality of the last paragraph of Section 2255 of Title 28 U. S. C. restricting prisoners' rights of habeas corpus has not been passed upon by the Supreme Court and this question is also of vital importance in many cases involving said section in the lower courts. We submit that said restriction is unconstitutional.

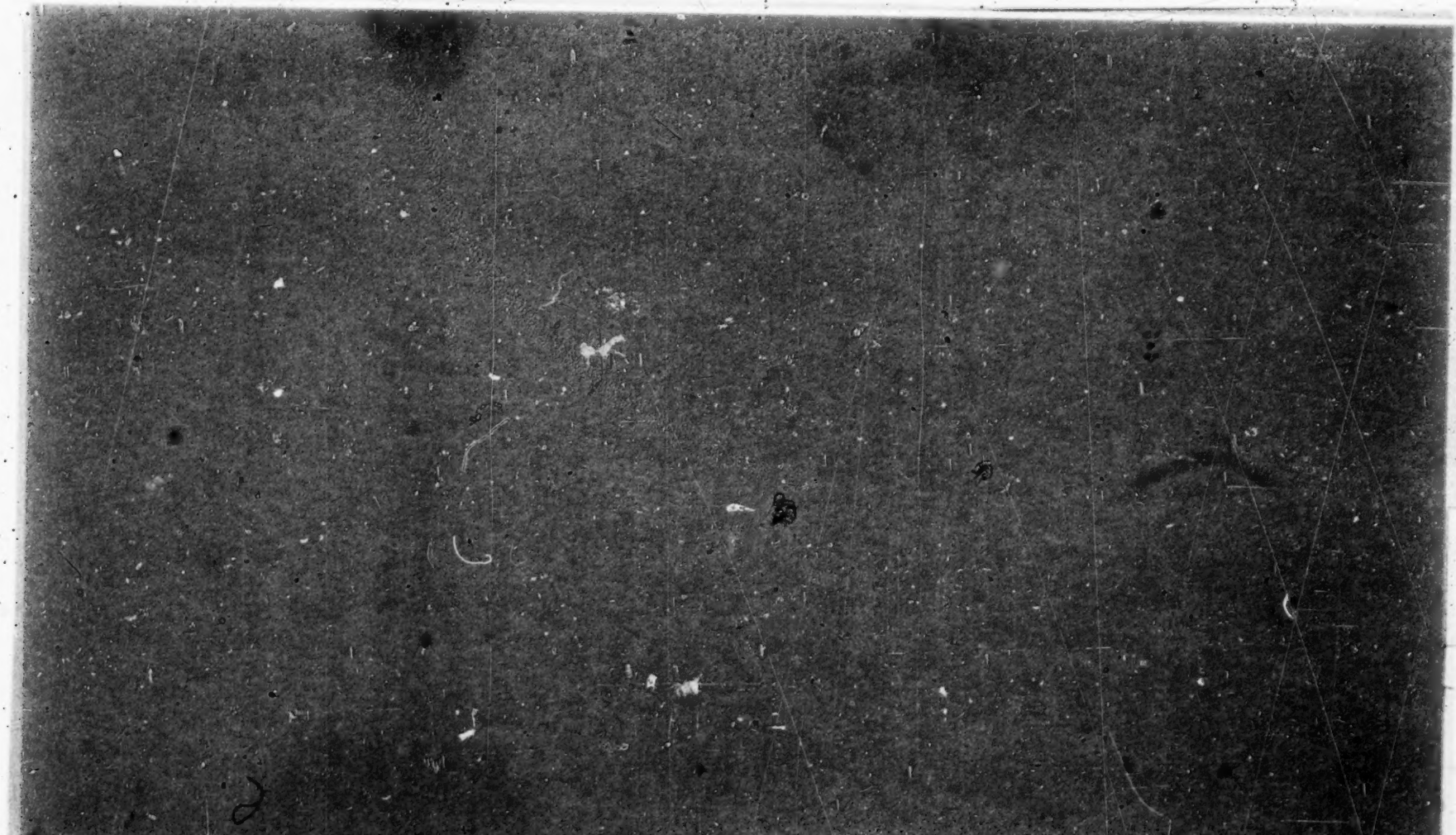
We further submit that petitioner has never been able to obtain a decision or opinion from either the U. S. District Court or the Circuit Court on the merits of the grounds urged by him in his petition for a writ of

habeas corpus and that it is entitled to a decision on the merits of his petition.

We respectfully urge that this Court should grant Certiorari to the end that the judgment and order of the U. S. District Court, and the opinion of the Circuit Court of Appeals affirming the lower court judgment be reversed, and that this Court grant the petition for the Writ of Habeas Corpus.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Petitioner Michele Marchese.



APPENDIX A.

Return to Petition for a Writ of Habeas Corpus.

Francis C. Whelan
United States Attorney

Thomas R. Sheridan
Assistant United States Attorney
Chief, Criminal Division

Wm. Bryan Osborne
Assistant United States Attorney
Assistant Chief, Criminal Division

600 Federal Building
Los Angeles 12, California
Telephone: MAdison 5-7411, Ext. 540

Attorneys for Plaintiff
United States of America.

United States District Court for the Southern District of California, Central Division.

Michele Marchese, Petitioner, v. United States of America, and Preston Smith, Warden of United States Correctional Institution at Terminal Island, California, Respondent. No. 801-61-TC.

Filed June 29, 1961.

COMES NOW the respondent, United States of America, and avers as follows: The Court should dismiss the instant Petition for a Writ of Habeas Corpus

for the reason that the Court is without jurisdiction to entertain said Petition.

Respectfully submitted,

Francis C. Whelan
United States Attorney

Thomas R. Sheridan
Assistant United States Attorney
Chief, Criminal Division

/s/ Wm. Bryan Osborne
Wm. Bryan Osborne
Assistant United States Attorney
Assistant Chief, Criminal Division

APPENDIX B.

Order.

United States District Court, Southern District of California, Central Division.

Michele Marchese, Petitioner, v. United States of America, et al., Defendants. No. 801-61-TC.

Filed June 29, 1961.

An examination of the Petition for Writ of Habeas Corpus in the above matter discloses that after conviction in this court, the conviction was affirmed by the judgment of the United States Court of Appeals for the Ninth Circuit; that thereafter the Petitioner filed a motion under 28 U.S.C. 2255, which motion was denied.

From the face of the Petition, it also appears that the issues presented have been "passed and re-passed upon by the Trial Court."

In view of the foregoing, this Court lacks jurisdiction to entertain the Writ [*Jones v. Squire* (9 Cir. 1952) 195 F. 2d 179], and accordingly the Petition for the Writ is denied, and it is ordered dismissed.

Dated: Los Angeles, California, June 29, 1961.

Pierson M. Hall,
Chief Judge, U. S. District Court.

APPENDIX C.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Michele Marchese, Appellant, vs. United States of America, and Preston Smith, Warden of U. S. Correctional Institution at Terminal Island, California, Appellees. No. 17,480. May 31, 1962.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes, Jertberg, Circuit Judges, and Davis, District Judge

Davis, District Judge

This is an appeal from an order of the United States District Court, Southern District of California, denying appellant's petition for a writ of habeas corpus. The appeal is made pursuant to 28 USCA §2253.

Appellant was convicted of narcotics violations and sentenced to imprisonment, and is confined within the jurisdiction of the same court. Hence that court is the proper forum for either a motion under 28 USCA §2255, or for a petition for writ of habeas corpus.

After appealing his conviction to this Court, and being denied certiorari by the Supreme Court of the United States, appellant filed in the court which imposed the sentence, a motion under §2255 to annul, vacate and set aside the judgment of conviction. That motion was finally denied March 15, 1961, and no appeal was taken from that order.

On June 20, 1961, the instant habeas corpus action was filed and was dismissed by the District Court for

lack of jurisdiction. The portions of §2255 pertinent to this appeal are:

> "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.
>
> "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.
>
> "*An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*" (Emphasis supplied).

In the enactment of §2255, ". . . the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum". (Emphasis supplied). *United States vs. Hayman*, 342 U. S. 205, 72 S. Ct. 263, 96 L. Ed. 232.

This viewpoint is even more clearly expressed in *Hill vs. United States*, 368 U. S. 424, 82 S. Ct. 468, wherein the Supreme Court said:

> ". . . Suffice it to say that it conclusively appears from the historic context in which §2255 was

enacted that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined."

Petitioner contends that the provision of §2255 which seeks to limit the use of habeas corpus is violative of Article I, Section 9, Clause 2 of the Constitution of the United States. This court has considered that question numerous times, and is still of the opinion expressed in *Jones vs. Squier*, 195 F. 2d 179 (9th Cir. 1952):

". . . The judgment in the conspiracy and aiding and abetting case shows on its face that the court had jurisdiction of the subject matter and of the person of Jones who appeared and pleaded not guilty. Hence no relief can be afforded Jones under the Great Writ as it stood at the time the Constitution was adopted. Under that Writ the court was confined to the face of the judgment and the process by which jurisdiction over the accused was had for the sole purpose of determining whether the convicting court had jurisdiction of the prosecution and the accused. The court could not even examine the indictment to see if it charged an offense not punishable criminally. See Chief Justice Marshall's opinion for a unanimous court in Ex parte Watkins, 3 Pet. 193, 202, 209, 7 L. Ed. 650, Cf. Frank v. Mangum, 237 U. S. 309, 330, 35 S. Ct. 582, 59 L. Ed. 969.

"It was not until 1867 that Congress created the new forms of relief on matters not appearing in the judgment roll 'in addition' to that previously

available. 14 Stat. 385, 28 U. S. C. §2242 et seq. The determination of these rights has been held not res judicata. Salinger v. Loisel, 265 U. S. 225, 44 S. Ct. 519, 68 L. Ed. 989. It is obvious that since these additional rights were created by Congress, Congress could take them away, or, as here, confine their litigation to the §2255 proceeding."

Petitioner, having failed to appeal from the denial of his motion under §2255, may not now question either the ruling on that motion, or the validity of his sentence, by use of habeas corpus.

Petitioner fares no better if his application for writ of habeas corpus is treated as a second motion under §2255. That statute provides that the sentencing Court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner. Appellant insists in his brief that the third, fourth, fifth and sixth grounds of the habeas corpus application include new questions not advanced in his first §2255 motion. An examination of these claims shows that they are all based upon the fact that decisions of the Supreme Court of the United States subsequent to the original motion under §2255 had raised possible new constructions of some statutes applicable to petitioner's problems. Such matters would not be considered under a writ of habeas corpus prior to the enactment of §2255, and consequently would not be applicable as new grounds under a second motion under §2255. This is clearly established in *Hill vs. United States,* supra, where the court said:

"In *Sunal v. Large,* 332 U. S. 174, the Court held that the remedy of habeas corpus was unavailable in circumstances far more compelling than are pre-

sented here. There the petitioners at their criminal trial had been denied an opportunity to present a defense which subsequent decisions of this court had held should clearly have been available to them. What was said in that is apposite here:

"'We are dealing here with a problem which has radiations far beyond the present cases. The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law. . . . That error did not go to the jurisdiction of the trial court. Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction. It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision has given increased relevance to a point made at the trial but not pursued on appeal . . . . If in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications. . . . Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court.' 332 U. S., at 181-182."

Even if these may be considered as new grounds, the application fails to set forth the reason why petitioner was previously unable to assert the new grounds, and does not allege that he had previously been unaware of the significance of the relevant facts which is a standard established for consideration of successive motions under §2255. *Sanders vs. United States,* 297 F. 2d 735 (9th Cir. 1961).

It appearing from the foregoing that the application for habeas corpus was defective on its face and contrary to the provisions of §2255, the District Court was correct in holding that it had no jurisdiction to entertain the same, and in ordering that the petition be denied.

This makes it unnecessary to consider the contention of appellant that the court should have permitted him to be personally present at the hearing on the petition, inasmuch as the issue before the court was purely one of law, and did not require the presence of petitioner. Such presence is warranted only where there is required to be determined by the court a question of fact wherein petitioner's own knowledge is involved. *Walker v. Johnson,* 312 U. S. 275, 61 S. Ct. 574, 85 L. Ed. 830; *United States v. Hayman, supra.*

For reasons appearing above, the petitioner's request that this court treat this appeal as an original petition for a writ of habeas corpus is denied.

(Endorsed) Opinion Filed May 31, 1962.

Frank H. Schmid, Clerk.

FILED
SEP 21 1962
JOHN F. DAVIS, CLERK

No. 362

In the Supreme Court of the United States

OCTOBER TERM, 1962

MICHELE MARCHESE, PETITIONER

v.

UNITED STATES OF AMERICA AND PRESTON SMITH, WARDEN OF THE UNITED STATES CORRECTIONAL INSTITUTION AT TERMINAL ISLAND, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
PHILIP R. MONAHAN,
Attorney,
Department of Justice,
Washington 25, D.C.

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658494—62——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 100–104; Pet. App. C, pp. 4–9) is reported at 304 F. 2d 154. The opinion and order of the district court (R. 54; Pet. App. B, p. 3) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1962 (R. 105), and a petition for rehearing was denied on July 12, 1962 (R. 106). The petition for a writ of certiorari was filed on August 22, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, following denial of a motion under 28 U.S.C. 2255 to set aside a conviction, a petition for a writ of habeas corpus seeking the same relief was properly denied for lack of jurisdiction.

2. Whether, if the habeas corpus petition be treated as a second motion under 28 U.S.C. 2255 (the place of imprisonment being within the jurisdiction of the sentencing court), the petition was in any event properly denied.

STATUTE INVOLVED

Section 2255 of Title 28 of the United States Code provides:

> § 2255. *Federal custody; remedies on motion attacking sentence.*
>
> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, de-

termine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pur uant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Ninth Circuit affirming an order of the United States District Court for the Southern District of California denying, for lack of jurisdiction, a petition for a writ of habeas corpus. The pertinent facts are as follows:

1. On June 16, 1958, petitioner was convicted in the district court on ten counts of an indictment charging him and one Del Bono, a co-defendant, with conspiracy to violate the narcotics laws and with making three illegal sales of heroin. Petitioner was sentenced to concurrent terms of ten years' imprisonment. On April 15, 1959, his conviction was affirmed (*Marchese* v. *United States*, 264 F. 2d 892 (C.A. 9)), and on June 29, 1959, this Court denied certiorari (360 U.S. 930).

The evidence adduced at the trial (see brief in opposition to certiorari, Nos. 922 and 898 Misc., Oct. Term, 1958, *Marchese* v. *United States* and *Del Bono* v. *United States*, pp. 4–7) showed that petitioner, on three occasions between January 30 and March 13, 1958, sold heroin to Donald Sussman, a user of narcotics, who, during this period, was acting as a government informer. Sussman had been selling drugs on consignment for petitioner for some four years previously and had been arrested shortly before January 30. During the next six weeks he cooperated with government officers in a joint federal-state investigation of petitioner's narcotics activities. The government's proof consisted in part of incriminating statements made to Sussman by petitioner in the apartment

of a Miss Nichols, where petitioner also lived. These statements had been overheard by two of the officers through the use of a radio transmitter concealed on Sussman's person. Other evidence consisted of statements made by petitioner to Sussman over the telephone, which one of the officers overheard by placing his ear next to the receiver with Sussman's permission.

2. On November 16, 1960, petitioner, through counsel, filed in the district court a motion to vacate his conviction under 28 U.S.C. 2255 (R. 65–91). The grounds relied on, in the language of the motion (R. 66), were as follows: (1) "The judgment of conviction by use of 'silver platter' evidence is in violation of the due process of law clause of the Constitution * * *"; [1] (2) "The exclusionary rule prohibits the use of the testimony of a government witness induced by immunity in fact or direct promise by responsible government authorities and such a judgment of conviction must be annulled * * * as it is violative of * * * due process * * *"; and (3) "The trial resulting in the judgment of conviction * * * was neither fair nor impartial and was the result of

[1] Actually, the so-called "silver platter" doctrine (the rule that evidence unlawfully seized by state officers is admissible in a federal prosecution if the illegal seizure was not participated in by federal officers), which the Court overruled in *Elkins* v. *United States*, 364 U.S. 206, and *Rios* v. *United States*, 364 U.S. 253, was not involved at petitioner's trial. As pointed out in the government's opposition to the Section 2255 motion (R. 95), there was no search or seizure in this case except with respect to a dismissed count, and the principle would not have been applicable in any event since federal agents participated with state officers in the conduct of the investigation.

the highly prejudicial and calculated misconduct of the prosecutor by knowingly presenting unreliable and inadmissible evidence, in violation of the due process of law clause * * *." In substance, the motion challenged the trustworthiness and admissibility of Sussman's testimony on the grounds that he was an addict-informer who allegedly had been promised preferential treatment and a light sentence if he would aid the narcotics agents in making a case against petitioner (R. 81–82, 83–84, 85, 91). The motion also disputed the admissibility of the evidence obtained through the use of the radio transmitter (R. 78–79).

The government opposed the motion (R. 94–95) on the ground that, aside from petitioner's reliance on the rejection by this Court of the "silver platter" doctrine in *Elkins* v. *United States,* 364 U.S. 206 (which, the government pointed out, had no relevance to this case (see fn. 1, *supra,* p. 5)), the motion, in substance, did no more than challenge the credibility of Sussman and the government's use of a transmission device attached to the person of Sussman (R. 95). It was pointed out that those issues had already been litigated at the trial and on the appeal, and that a motion under 28 U.S.C. 2255 does not lie to raise matters which were in fact or should have been raised on appeal (*ibid.*).

On March 15, 1961, following argument, the motion to vacate was denied as "not well taken" (R. 96). No appeal was taken.

3. On June 20, 1961, acting through the same attorney who represented him in the Section 2255 proceeding and one additional lawyer, petitioner filed

the petition for a writ of habeas corpus here involved, in which he again challenged the validity of his conviction (R. 2–47). (The institution in which petitioner was serving his sentence was within the jurisdiction of the sentencing court.) Averring that he had "complied with the prerequisite of Title 28 U.S.C., Section 2255, by motion in the trial court to vacate and set aside the judgment," the denial of which, he said, while erroneous, was necessary to the jurisdiction of the court to issue a writ of habeas corpus, he stated that "[t]he issues involved * * *, although passed and repassed upon by the trial court, are not within the rule of res judicata * * *" (R. 5–6). The petition proceeded to enumerate six "points and grounds" for granting the relief sought, as follows (R. 13–14):

> 1. The judgment of conviction by the use of "silver platter" evidence is in violation of the Due Process of Law Clause of the Constitution of the United States;
>
> 2. Sussman's entire course of behavior from January 29, to March 13, 1958, was part of an agreement and conspiracy between himself and Federal and State authorities to ensnare the petitioner, in exchange for money, [n]arcotics, favoritism and lenieney for himself. Such course of conduct and subsequent testimony, over objections, denied the petitioner a fair and impartial trial guaranteed him under the Fifth Amendment of the United States Constitution;
>
> 3. During the petitioner's trial, the United States Attorney abused the privileges of his office by actively participating in the suppres-

sion of the truth and failing to disclose the truth concerning the obvious agreement or understanding between Donald Sussman and the Federal and State authorities, contrary to their oath of office and in disregard of the petitioner's constitutional rights under the Fifth Amendment;

4. The use of evidence obtained by the electronic recording device known as the Schmidt Transmitter was unlawful and violative of the Fourth Amendment of the Constitution, and hence cannot support the judgment of conviction;

5. The arrest of the petitioner without a warrant of arrest, the search of his person and of his apartment or residence, the search of the automobile driven by the defendant Del Bono, as well as the searches made at other places without a search warrant, were all in violation of the Fourth Amendment;

6. The evidence obtained by an unauthorized interception of a telephone conversation is in violation of Title 47, U.S.C.A., Section 605, as well as in violation of the Fifth Amendment to the Constitution.

The government filed a return (R. 48) stating that the court was without jurisdiction to entertain the habeas corpus petition. It pointed out that Section 2255 (*supra*, pp. 2–3) prohibits entertaining an application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion under that section if it appears that the applicant has failed to apply for such relief, or

that such relief has been denied, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention (R. 49). The government further pointed out that the petition acknowledged that the issues sought to be raised had been "passed and repassed upon by the trial court," and stated that the record revealed that petitioner had "presented the identical questions to the trial court, the Appellate Court and then again to the trial court in a motion under [28 U.S.C. 2255], and that in each instance his contentions were rejected" (*ibid.*). The government's answer further observed that, if the petition were considered as a second motion under Section 2255, that section provides that the sentencing court "shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner" (*supra,* p. 3) (R. 52).

On June 29, 1961, the district court denied the petition in an order reading (R. 54; Pet. App. B):

> An examination of the Petition for Writ of Habeas Corpus * * * discloses that after conviction in this court, the conviction was affirmed by the judgment of the United States Court of Appeals for the Ninth Circuit; that thereafter the Petitioner filed a motion under 28 U.S.C. 2255, which motion was denied.
>
> From the face of the Petition, it also appears that the issues presented have been "passed and re-passed upon by the Trial Court."
>
> In view of the foregoing, this Court lacks jurisdiction to entertain the Writ [*Jones* v. *Squi*[*er*] (9 Cir. 1952) 195 F. 2d 179], and

accordingly the Petition for the Writ is denied, and it is ordered dismissed.[2]

4. On appeal from the latter order, petitioner, revoking his concession that the issues sought to be raised had been "passed and repassed upon by the trial court,"[3] argued that the third, fourth, fifth and sixth grounds of the habeas corpus petition (*supra*, pp. 7–8) presented new issues not involved in the motion under Section 2255 (R. 102; Pet. App. C, p. 7).

The court of appeals held that petitioner, "having failed to appeal from the denial of his motion under § 2255, may not now question either the ruling on that motion, or the validity of his sentence, by use of habeas corpus" (R. 102; Pet. App. C, p. 7). The court further held that petitioner "fare[d] no better" if the habeas corpus petition were treated as a second motion under Section 2255. Observing that Section 2255 provides that the sentencing court shall not be

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[2] It is apparent from the court's citation of *Jones* v. *Squier*, 195 F. 2d 179 (C.A. 9), for its holding that it lacked jurisdiction to entertain the petition that it predicated its decision on the ground that Section 2255 provided an adequate remedy and a motion under that section had previously been denied—not merely that the petition raised issues that had been "passed and re-passed upon." For the *Jones* decision was based on the former, not the latter, ground. Where a second or successive motion for similar relief is filed under Section 2255, that section provides that the court "shall not be required to entertain" the motion. The court may consider it, however, as a matter of discretion.

[3] Petitioner stated in his court of appeals brief (on which he was represented by the same attorneys who had represented him in the district court) that the concession was "probably the result of a careless and inadvertent expression" (p. 13).

required to entertain a second or successive motion for similar relief on behalf of the same prisoner, and that petitioner acknowledged that two of the grounds relied on in the habeas corpus petition had been urged in the Section 2255 motion, the court held, with respect to the allegedly new grounds, (1) that these grounds were not cognizable under Section 2255, and (2) that, even if they were, and if they might be considered new, the petition was nevertheless defective on its face because it failed to explain why the new grounds could not have been asserted in the earlier motion or to allege that the petitioner had been previously unaware of the significance of the relevant facts. For the latter aspect of its holding, the court cited its prior decision in *Sanders* v. *United States*, 297 F. 2d 735, pending on certiorari, No. 202 (R. 102–104; Pet. App. C, pp. 7–9).

ARGUMENT

We submit that the petition for a writ of habeas corpus was properly denied and that there is no need to reach the issue presented in the *Sanders* case.

1. Section 2255 (*supra*, p. 2–3) prohibits resort to habeas corpus where the remedy by motion under that section is adequate and it appears that relief thereunder either has not been sought or has been denied. The district court, accordingly, was correct in holding that, in view of the prior denial of petitioner's Section 2255 motion, seeking identical relief, it was without jurisdiction to entertain the habeas corpus petition. Petitioner's challenge of the validity of this aspect of Section 2255, as violative of the consti-

tutional prohibition against suspension of the writ of habeas corpus (Pet. 18–19), is without substance. *United States* v. *Hayman*, 342 U.S. 205; *Hill* v. *United States*, 368 U.S. 424, 427–428.

2. If the habeas corpus petition be treated as a second motion under Section 2255, its denial was in any event correct, as the court of appeals held.

The first two grounds relied on in the petition were concededly the same in substance as the grounds urged in the Section 2255 motion, from the denial of which petitioner took no appeal.[4] As pointed out in the government's opposition to the Section 2255 motion (*supra*, p. 6), and as the district court, in denying the motion, held (*supra*, p. 6), neither ground presented an issue cognizable under Section 2255. One of the grounds, indeed, as indicated above, was based on a mistaken notion of the meaning of the "silver platter" principle.

Of the four grounds claimed by petitioner to involve new matter, two of the items, 4 and 6 (*supra*, p. 8), related to alleged errors in the admission of evidence at petitioner's trial. It is, of course, "settled law that a motion * * * under 28 U.S.C.

[4] For this reason, even if one or both of these grounds had been otherwise cognizable under Section 2255, the second motion (to the extent it relied on those grounds) would have been deniable as a matter of discretion under the paragraph of Section 2255 which states that the court "shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner" (*supra*, p. 3). See, *e.g.*, *Long* v. *United States*, 245 F. 2d 871 (C.A. 6), certiorari denied, 355 U.S. 878; *Burns* v. *United States*, 229 F. 2d 87, 89 (C.A. 8), certiorari denied, 351 U.S. 910; *Jackson* v. *United States*, 224 F. 2d 556 (C.A. 4), certiorari denied, 350 U.S. 924.

§ 2255 cannot be used in lieu of an appeal to correct errors committed in the course of a trial, even though such errors relate to constitutional rights * * *." *Davis* v. *United States*, 214 F. 2d 594, 596 (C.A. 7), certiorari denied, 353 U.S. 960, and cases cited.[5]

A third ground, No. 5 (*supra*, p. 8), involved claimed illegality in the maner in which petitioner was arrested and certain searches were conducted, and was even more remote from anything cognizable under Section 2255.[6]

The only one of the six grounds which even superficially presented the type of issue properly cognizable under Section 2255 was the third (*supra*, pp. 7–8), charging that the United States Attorney "abused the privileges of his office by actively participating in the suppression of the truth and failing to disclose the truth concerning" an alleged "obvious agreement or understanding between Donald Sussman and the Fed-

[5] The evidence in question was in any event properly received. As to the statements of petitioner overheard by the officers through the use of the radio transmitter (ground 4), cf. *On Lee* v. *United States*, 343 U.S. 747; as to his statements made to Sussman over the telephone and overheard by an officer with Sussman's permission (ground 6), see *Rathbun* v. *United States*, 355 U.S. 107. The admissibility of the telephone evidence, moreover, involved at most a matter of petitioner's statutory, not his constitutional, rights.

[6] The search of petitioner's person and apartment at the time of his arrest did not, as petitioner acknowledges (Pet. 16), result in the discovery of any evidence sought to be used at the trial. As for the narcotics which were removed by Sussman from Del Bono's automobile (see *ibid.*), even if this removal amounted to an illegal seizure, it was not one of which petitioner could complain. In any event, the most that would be involved, here again, would be a question of the admissibility of evidence.

eral and State authorities." Examination of the specific allegations made under this head, however, reveals not only that the "agreement or understanding" which the petition claimed had been made between Sussman and the agents was entirely the product of surmise and conjecture on petitioner's part, but that the very portion of the trial record on which the petitioner predicated his charge that the United States Attorney took an active part in suppressing relevant truth specifically refuted the accusation.

The petition alleged that prior to the trial the complaint on which Sussman was arrested was dismissed, and a lesser charge, carrying a lighter penalty, was substituted; that he was thereafter sentenced to two years' imprisonment, the minimum imposable under the substituted charge; and that, following revocation of his probation under a prior state narcotics conviction, he was sentenced to one year's imprisonment thereunder, to run concurrently with his federal sentence, with the consequence that the state sentence did not increase the period of his imprisonment. On the basis of these representations the petitioner asked, rhetorically, whether "a deal" had been made between Sussman and the narcotics agents whereby Sussman, in exchange for the agents' influence in securing lenient disposition of the state and federal charges, would cooperate with the agents in bringing about the arrest and conviction of petitioner, and answered with the assertion that "[e]ven the most naive person would have trouble putting his head in the sand to refuse to see this *apparent* bargain * * *" [emphasis added] (R. 21).

This "apparent bargain," the petition went on to allege, had been concealed by the United States Attorney at the trial. That officer, it was said (R. 22),—

> not only stood by and permitted such a bargain to go undisclosed, but he took an active part in suppressing the evidence with respect to the same, and even permitted Agent Richards to deny that any such bargain was made.

The petition attempted to document this accusation by citing passages from the trial transcript showing (1) that agent Richards denied on cross-examination that he, or anyone in his presence, had told Sussman that he would receive a lighter sentence than he might otherwise get if he would cooperate with the agents in their investigation of petitioner, (2) that Sussman acknowledged on cross-examination that his cooperation with the agents was motivated in part by the hope of receiving a lighter sentence and that he knew he would "probably" get a lighter sentence if he cooperated (the petition argued that Sussman thereby impliedly denied that there was an actual agreement), and (3) that, when agent Richards was asked on cross-examination whether he had made "some kind of an agreement with" Sussman, the United States Attorney objected to the question (R. 22–23).

Obviously, however, agent Richards was not shown to have testified falsely in denying that he had been a party to an agreement with Sussman, the very existence of which was purely conjectural. The same is true of Sussman's testimony—even if we construe it, with petitioner, as impliedly denying that an agreement had been made. Much less was there any indi-

cation that the United States Attorney knowingly permitted false testimony to stand. As for the charge that government counsel, by objecting to the question asked of agent Richards as to whether he had made an agreement with Sussman, "actively participat[ed] in the suppression of the truth," the record shows that the objection was based solely on the ground that the question "called for a conclusion of the witness;" the attorney made it specifically clear that he had no objection to the elicitation of any relevant "facts" (R. 23).

In short, the trial record, on which petitioner relied as showing the commission of perjury and the suppression by the government of relevant evidence, wholly failed to support any such accusation. Thus, ground 3 of the petition, like the others, presented nothing which either required or warranted a hearing under Section 2255, and the petition was properly denied even if viewed as a second motion under that section.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
PHILIP R. MONAHAN,
Attorney.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962
No. 362.

MICHELE MARCHESE,

Petitioner,

vs.

UNITED STATES OF AMERICA AND PRESTON SMITH, WARDEN OF THE UNITED STATES CORRECTIONAL INSTITUTION AT TERMINAL ISLAND, CALIFORNIA,

Respondent.

Petitioner's Reply Brief to the Respondent's Brief In Opposition.

RUSSELL E. PARSONS,
306 West Third Street,
Los Angeles 13, California,

SOL C. BLUMENHOLTZ,
1209 Court Square Building,
Baltimore 2, Maryland,

Attorneys for Petitioner Michele Marchese.

Parker & Son, Inc., Law Printers, Los Angeles, Phone MA. 6-9171.

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Petitioner's Reply Brief to the Respondent's Brief In Opposition.

I.

This Court Has Inherent Power to Correct Fundamental Defects and to Correct Errors Which Have Been Committed Which Seriously Affect the Fairness, Integrity, or Public Reputation of Judicial Proceedings.

In the Respondent's Brief in Opposition to this Petition, the Respondent presents the questions as follows:

1. Whether, following denial of a motion under 28 U. S. C. 2255 to set aside a conviction, a Petition for a Writ of Habeas Corpus seeking the same relief was properly denied for lack of jurisdiction.

2. Whether, if the Habeas Corpus Petition be treated as a second motion under 28 U. S. C. 2255 (the place of imprisonment being within the jurisdiction of the sentencing court), the Petition was, in any event, properly denied.

We submit that the questions as presented by the Respondent do not touch specifically the essence of the issues presented to this Court. It is Petitioner's claim that the District Court erred in denying the Petition for Writ of Habeas Corpus on the asserted basis of lack of jurisdiction to entertain the Writ. It did not adjudicate any of the substantial questions raised by the Petitioner. Likewise, the Court of Appeals in affirming the action of the District Court did not touch on the substantive questions raised by the Petitioner but relied for its affirmance upon technical procedural grounds. Among other things that Court cited the case of *Hill v. United States*, 368 U. S. 424, 82 S. Ct. 468, which quoted from the case of *Sunal v. Large*, 332 U. S. 174, 67 S. Ct. 1588, where this Court held that the remedy of habeas corpus was unavailable to correct the error of the trial court which had denied the Petitioner an opportunity to present a defense which subsequent decisions of this Court had held should clearly have been available to them. This Court stated in the *Sunal* case, *supra*, at pages 181 to 182:

> "We are dealing here with a problem which has radiations far beyond the present cases. The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an eror of law. . . . That error did not go to the jurisdiction of the trial court.

Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Courts of Appeals and by vesting us with certiorari jurisdiction. It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision has given increased relevance to a point made at the trial but not pursued on appeal. . . . If in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications . . . Wise judicial administration of the federal courts counsels against such course, *at least where the error does not trench on any constitutional rights of defendants* nor involve the jurisdiction of the trial court." (Emphasis added.)

In this case there are constitutional rights involved, and therefore comes within the exception above emphasized. To avoid repetition, we respectfully refer to the Petition for Writ of Certiorari heretofore filed. Without withdrawing anything therein stated by the Petitioner, we emphasize the fundamental and vital violation by the federal officers of Petitioner's rights to privacy as guaranteed by the Fourth Amendment, which was violated by the federal agents by sending an informer into Petitioner's home, which informer was paid with money and narcotics and who obviously was seeking leniency in the treatment to be afforded him by both

State and Federal Courts, wherein indictments against him were then pending, and which informer had concealed on him by the federal officers a Schmidt electronic device which permitted the Federal officers, who were on the outside of his home and perhaps a block away, to overhear and listen to the conversations betwee Petitioner and the informer and to testify to those conversations in the trial against the Petitioner over his opposition. This was an unequivocable invasion of the Petitioner's privacy which is illegal and should not be countenanced by American law. We respectfully urge that the philosophy expressed in the dissenting opinions of Justice Black, Justice Frankfurter, Justice Douglas and Justice Burton in the case of *On Lee v. United States*, 343 U. S. 747, 72 S. Ct. 967, as well as the dissenting opinion of Justices Brandeis, Holmes and Butler in the case of *Olmstead v. United States*, 277 U. S. 438, 48 S. Ct. 564 should be adopted as the limitations of permissive practices by federal agents in criminal investigations. In the light of the progressive and pernicous practices of federal agents in criminal investigation,[1] which practices have received moral condemnations even from those Justices who have declared that the conduct was not violative of any of the constitutional guarantees, we ask this Court to declare and announce that the practices engaged in by the federal officers in this case be condemned as in violation of the Fourth and Fifth Amendments, and in any event, not worthy of this Country's conception of decency or

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[1] *Olmstead v. United States, supra; Goldman v. United States*, 316 U. S. 129, 62 S. Ct. 993; *On Lee v. United States, supra; Silverman v. United States*, 365 U. S. 505, 81 S. Ct. 679.

integrity, which should above all else mark the character of American justice.

It is not a sufficient answer for the Government to say that in such a case as this it is simply an instance where a person has had a conversation with one in whom he made a mistake in trusting—that the informer would not be legally incompetent to testify to the statements made by the defendant. This may be so, but it is another thing entirely to permit the federal officers to testify to what they heard, standing outside of one's house, by use of the electronic device concealed on the person of the informer without knowledge of the defendant. This is not only hearsay but also "dirty business". The time has come to outlaw this practice. "The law of this Court ought not to be open to the just charge of having been dictated by the 'odious doctrine', as Mr. Justice Brandeis called it, that the end justifies reprehensible means. To approve legally what we disapprove morally, on the ground of practical convenience, is to yield to a short-sighted view of practicability." (Dissenting opinion by Mr. Justice Frankfurter in the case of *On Lee*[2] *v. United States, supra.*) The essence of the complaint in this case with respect to the use of the electronic device is that it is different from the cases where a federal officer is stationed *outside* of a house or room which he has no warrant or permission to enter, and by the use of a hearing aid, detecta-phone or other device *outside* of the premises is thus enabled to listen to a conversation.

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[2]It is to be remembered that in the *On Lee* case, the informer had gone into the front room of a building, which was used as a laundry, and where the public was invited to go.

In the case of *Silber v. United States*, ... U. S. ....., 82 S. Ct. 1287, this Court, in a case where a defendant did not present to the Court of Appeals or to this Court an issue raised by his motion to dismiss, stated:

> ". . . In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. United States v. Atkinson, 297 U. S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 . . ."

It is submitted that the conduct of the federal agents in this case not only adversly affects the fairness, integrity and public reputation of judicial proceedings . . . but their conduct should be declared to be in direct and complete defiance of the constitutional rights of the Petitioner as guaranteed by the Fourth and Fifth Amendments. As Mr. Justice Douglas said in his concurring opinion in the *Silverman* case, 365 U. S. 505, 513, 81 S. Ct. 679, 683:

> ". . . Our concern should not be with the trivialities of the local law of trespass, . . . Rather our sole concern should be with whether the privacy of the home was invaded. . . ."

Further, the conduct of the federal officers in the investigation and arrest of the Petitioner and the trial of the Petitioner was without due process of law as guaranteed by the Fifth Amendment.

II.

Habeas Corpus or in the Alternative a Successive Motion Under Section 2255 Can Be Availed of to Correct an Error Which Is Constitutional.

It is recognized that generally errors are to be corrected through the appellate route but as this Court stated in the case of *Bowen v. Johnston,* 306 U. S. 19, 26, 59 S. Ct. 442, 446:

> ". . . But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent . . ."

In this case, despite all the efforts of the Petitioner to have an adjudication of the substantive claims which he has set forth there has never yet been an adjudication of them. Denials have either been without opinion or have been based on procedural technical grounds. In the case of *Hodges v. United States,* 368 U. S. 139, 82 S. Ct. 235, this Court dismissed the Wirt of Certiorari which it had previously granted to determine whether the District Court should have accorded Petitioner a hearing under Section 2255, when it appeared that no appeal had been perfected from the original judgment of conviction. Upon examination of the record it was found that the District Court did, in fact, conduct a hearing upon Petitioner's motion but that the minutes of such hearing had been lost. This Court held that whether or not that hearing was adequate need not be determined for it was satisfied from the record and the trial transcript that it was a case where no hearing was required because the files and records

of the case conclusively showed that the Petitioner was not entitled to any relief. There was a dissenting opinion by Mr. Justice Douglas with whom the Chief Justice and Mr. Justice Black concurred in which dissenting opinion it was stated as follows at page 237:

> "If the error now being pressed were a non-constitutional one, relief might be denied, citing Sunal v. Large, 332 U. S. 174, 67 S. Ct. 1588, 91 L. Ed. 1982. But in that case, where *habeas corpus* was sought to do service as an appeal, we made clear that we were not dealing with constitutional defects in the trial. Id., 332 U.S. at 178, 182, 67 S. Ct. at 1590. When a constitutional issue was presented, we took the other course and allowed relief by way of Sec. 2255, at least until today. See, e. g., Jordan v. United States, 352 U.S. 904, 77 S. Ct. 151, 1 L. Ed. 2d 114. . . ."

It would appear that had constitutional rights been involved in the *Sunal* case, *supra*, this Court, speaking through Mr. Justice Douglas, would not have decided the *Sunal* case as it did, but on the contrary if constitutional rights of the defendants had been involved, we venture to state, from the opinion of this Court and from Mr. Justice Douglas' dissenting opinion above quoted habeas corpus would have been permitted to do the service of an appeal.

Where, as in this case, the Court of Appeals affirmed the original Judgment of conviction without opinion, and this Court denied the Petition for Certiorari without opinion, and where subsequently the sentencing court denied the Petitioner's Motion under Section 2255 without opinion, and subsequently denied

the Petition for Writ of Habeas Corpus without opinion, and where the Court of Appeals affirmed the said denial without adjudicating the substantial questions raised by Petitioner but relied principally on technical procedural grounds, we submit that habeas corpus, or in the alternative, this Petition should be considered as a successive motion under Section 2255, should be permitted. Assuming, for the purposes of discussion, that a sentencing court is not required to entertain a second or successive motion, we submit that it cannot arbitrarily refuse to pass and adjudicate the substantial questions, constitutional and otherwise, raised by Petitioner and then arbitrarily refuse to entertain a second or successive motion for relief. We therefore ask this Court to consider this application for a writ of habeas corpus, or in the alternative, as a successive motion under Section 2255, and thus afford the Petitioner an opportunity to have an adjudication on the merits of the substantial questions raised by him, both constitutional and otherwise.

Without withdrawing what the Petitioner has stated in its Petition for Writ of Certiorari on page 6 with respect to the unconstitutionality of the restrictive provisions of Section 2255, we would like to point out that Section 2255 does not, by its terms, nor was it intended to, abrogate or eliminate the right of a prisoner to test the validity of his imprisonment by any court of competent jurisdiction which, of course, would include the court of jurisdiction at the place of imprisonment which, in most cases, is a court different from that of the sentencing court. In the case of *Hill v. United States*, 82 S. Ct. 468, after citing the

case of *United States v. Hayman*, 342 U. S. 205, 72 S. Ct. 263, this Court stated at page 471:

> ". . . that it conclusively appears from the historic context in which Section 2255 was enacted that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined . . ."

Further in the same case, this Court stated at page 471:

> ". . . Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum. . . ."

In the *Hill* case this Court held that the failure of the trial court to follow the formal requirements of Federal Criminal Rule 32(a) was not of itself such an error that can be raised by collateral attack. This Court stated at page 471:

> ". . . It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' Bowen v. Johnston, 306 U.S.

19, 27, 59 S. Ct. 442, 446, 83 L. Ed. 455, see Escoe v. Zerbst, 295 U.S. 490, 55 S. Ct. 818, 79 L. Ed. 1566, Johnston v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461; Walker v. Johnston, 312 U.S. 275, 61 S. Ct. 574, 85 L. Ed. 830; Waley v. Johnston, 316 U.S. 101, 62 S. Ct. 964, 86 L. Ed. 1302."

The errors complained of in this case are of such character as to be the subject of collateral attack. Habeas corpus has been utilized for many years as the vehicle for such attack. If by the enactment of Section 2255 there was no purpose to impinge upon a prisoner's right of collateral attack, and if the sole purpose was to afford him the same rights in another and more convenient forum (*Hill v. United States, supra*), then it would follow that a prisoner has, at least, the same rights in the sentencing court under Section 2255, that he formerly had in the court of jurisdiction where he was imprisoned. We submit that a prisoner can still proceed in such a jurisdiction as he formerly could prior to the passage of Section 2255. In the case at bar the sentencing court is also the court having jurisdiction of the place of imprisonment. The fact that no appeal was taken from the denial, without opinion, of the Petitioner's Motion under Section 2255 by the sentencing court, does not bar him from seeking an adjudication either by habeas corpus or a successive motion under Section 2255. This Court has stated that the principle of *res adjudicata* does not apply to a decision refusing to discharge a prisoner. *Salinger v. Loisel*, 265 U. S. 224, 44 S. Ct. 519, 68 L. Ed. 989; *Waley v. Johnston*, 316 U. S. 101, 62 S. Ct. 964.

In the case of *Price v. Johnson*, 334, U. S. 266, 291, 68 S. Ct. 1049, 1063 (in which case a fourth application for writ of habeas corpus was made), this Court stated:

> ". . . The primary purpose of a ***habeas corpus*** proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief."

What this Court further said at page 293 of the *Price* case is as true today as it was before the passage of Section 2255:

> "We are not unaware of the many problems caused by the numerous and successive ***habeas corpus*** petitions filed by prisoners. But the answer is not to be found in repeated denials of petitions without leave to amend and without the prisoners having an opportunity to defend against their alleged abuses of the writ. That only encourages the filing of more futile petitions. The very least that can and should be done is to make ***habeas corpus*** proceedings in district courts more meaningful and decisive, making clear just what issues are determined and for what reasons."

This Petitioner has for several years been virtually reaching out his hands to the sky for help—but his substantive claims, if heard, have not been answered. Is it American justice to answer such pleadings with technical procedural denials?

The Court of Appeals, in affirming the denial of the Petition for Habeas Corpus in this case comments upon the fact that Appellant claimed that his Third, Fourth, Fifth and Sixth grounds of the Habeas Corpus application included new questions not advanced in his first Section 2255 Motion. The Court of Appeals stated at 304 F. 2d 154, 156-157:

> ". . . An examination of these claims shows that they are all based upon the fact that decisions of the Supreme Court of the United States subsequent to the original motion under Section 2255 had raised possible new constructions of some statutes applicable to Petitioner's problems. Such matters would not be considered under a writ of habeas corpus prior to the enactment of Section 2255, and consequently would not be applicable as new grounds under a second motion under Section 2255. . . ."

The Court of Appeals then cited the language of this Court in *Sunal v. Large, supra,* which was quoted in the case of *Hill v. United States, supra,* which quotation appears *supra.*

The Court of Appeals apparently did not pay much heed to the following words of this Court, although the Court of Appeals itself quoted this language at page 157:

> ". . . Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications. . . . Wise judicial administration of the federal courts counsels against such course. *at least where the error does not trench on any con-*

stitutional rights of defendants nor involve the jurisdiction of the trial court. . . ." (Emphasis added.)

The errors complained of in this case are not only constitutional but are also such as impair the fairness, integrity and public reputation of judicial proceedings.

III.

The Action of Both the Court of Appeals and the District Court Should Be Reversed as the Government, in Its Answer and Return to the Section 2255 Motion, as Well as the Petition for Writ of Habeas Corpus, Did Not Deny the Substantive Allegations of Either of Said Applications.

The government admits at page 6 of its Brief that in its answer to the Motion under Section 28 U. S. C. 2255 it contended that such a motion does not lie to raise the matters alleged. It further admits at page 8 of its Brief that in the Return to the Petition for Habeas Corpus the government made the point that the court was without jurisdiction to entertain the Petition for Habeas Corpus. It further admits at page 9 of its Brief that the District Court denied the Petition for Habeas Corpus on the asserted lack of jurisdiction. The Court of Appeals affirmed on technical procedural grounds.

The Respondents concede at page 13 of their Brief that at least one of the grounds alleged in the Section 2255 Motion, namely the third ground which generally was that the testimony of the informer, Sussman, was obtained as a result of an agreement of favorable treatment and leniency on the charges pending against the

said informer in both the State and Federal Courts, is properly cognizable under Section 2255. It is obviously impossible to have testimony directly showing such an agreement. At most, one can only show the facts from which a very strong inference is to be drawn. The government, at least, should be required to deny it, and if it does not do so, the allegation should be accepted as a fact. It matters not that the allegation, if true, would only affect the credibility of the witness. If any agreement or understanding was had it was the duty of the District Attorney to affirmatively disclose it. *Napue v. Illinois,* 360 U. S. 264, 79 S. Ct. 1173. The Government in this case seeks to argue the merits of the allegation without having denied the allegation, and without the Court having required any hearing on this very vital matter. The least that should have been done was to require a hearing to be had on this as well as the other allegations. *Walker v. Johnston,* 312 U. S. 275, 61 S. Ct. 574, *Waley v. Johnston,* 316 U. S. 101, 62 S. Ct. 964.

Conclusion.

The Petitioner has been incarcerated since July 10, 1959 as part of the ten year sentence imposed in this case. We respectfully urge that this Court permit the Writ of Certiorari to issue, and we further feel that it would be consistent with the course of justice to discharge the Petitioner forthwith.

RUSSELL E. PARSONS,
SOL C. BERENHOLTZ,
Attorneys for Petitioner Michele Marchese.